

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO.15 OF 2002

Shri Suhas Naik,
Hotel Shalimar Bar and
Restaurant,
M.G. Road,
Panaji, Goa

... APPLICANT

VERSUS

State of Goa
through Smt.Iva Fernandes,
Food Inspector,
Director of Food and
Drugs Administration,
Panaji, Goa

... RESPONDENT

Mr. S.D. Lotlikar, Sr. Advocate, with Ms. S.
Samant, Advocate, for the Applicant.

Ms Winnie Coutinho, Addl. Public Prosecutor, for
the Respondent State.

CORAM : D.G. DESHPANDE, J.

DATED : JANUARY 17/23, 2003.

ORAL JUDGMENT

Heard Mr. Lotlikar for the
accused/Applicant and Addl. Public Prosecutor for
the State. Accused/Applicant was convicted by the
trial Court under Section 16 of the Prevention of
Food Adulteration Act, 1954 and was sentenced to
undergo 6 months simple imprisonment and fine of
Rs.1000/-, in default, 15 days additional simple
imprisonment, which is the minimum sentence. Along
with him, three partners of the firm were also
prosecuted and all of them were also convicted by

the trial Court. However, on appeal, the conviction of the three partners was set aside and that of the present Applicant was confirmed. Hence this Revision.

2. Even though this is a Revision and the scope is limited, the matter was heard fully because of the technical nature of the offence.

3. Mr. Lotlikar contended firstly, that there was nothing on record to show that this accused was in-charge of the day-to-day conduct of business of the Hotel. No evidence in that regard was produced by the prosecution regarding non-compliance of Section 17. Therefore, according to him, in the absence of any evidence coming forth from the prosecution, the accused could not be held to be responsible for the conduct of the day-to-day business of the Hotel and, consequently, was liable to be acquitted on that count.

4. He further contended that the minimum quantity of biryani that was purchased by the Food Inspector was 1 Kg. By the Rules, he was required to make 3 equal shares or parts thereof and send the same for analysis. However, according to him, as per the report of the Chemical Analyser, what

was received by the Chemical Analyser for analysis was 500 grams of biryani, which means that the samples were not divided into 3 equal parts resulting in prejudice to the accused.

5. Thirdly, he pointed out that according to Food Inspector, no preservative was used while sending the biryani for analysis, whereas the Public Analyst in her evidence has stated that preservative was used. He further pointed out that analysis was done after 8 days and though the Food Inspector has stated that the sample was kept in the fridge, the benefit of delay was liable to be given to the accused. He also relied on the judgment of the Supreme Court in **State of Karnataka v. Pratap Chand and others** (AIR 1981 SC 872) in support of his contentions regarding non-compliance of the provisions of Section 17.

6. On the other hand, the learned Addl. Public Prosecutor contended that the scope of revision is limited and unless the Applicant succeeds in proving that both the Courts below had committed grave error of law and the judgment was patently and on the face of it, illegal, this Court could not interfere. She further contended that the prosecution has proved its case and Section 17,

sub-Section (1) could not come to the rescue of the accused. She also pointed out that the infirmities pointed out by the accused/Applicant were of no consequence and the judgment was not liable to be interfered with.

7. I have given my anxious consideration to the submissions made by Mr. Lotlikar so far as Section 17 of the Prevention of Food Adulteration Act, 1954 is concerned (hereinafter referred to as 'the Act'). It lays down as to who can be held responsible in respect of the offences committed by the Companies. Although therefore, the original accused was a partnership firm, this Section applies to them equally. From the scheme of the Section, it is clear that it is for the Company to prove as to who was nominated by them as the person in-charge and responsible to the conduct of the business of the Company. If such a nomination is made, then the Food Inspector is responsible to prosecute such person because such a person becomes liable for prosecution by virtue of the nomination. If no nomination is made by the Company, then every person who was at the time in-charge and was responsible for the conduct of the business of the Company, is to be held responsible. Admittedly, in the present case, even though 3 partners were

facing prosecution, they never took defence that as per the liability fixed on the Company under Section 17, they had, at any time in the past, made nomination of the person who was to be held responsible for the conduct of the business of the Company. Mr. Lotlikar tried to contend that it was for the Food Inspector to produce the relevant record. I am in total disagreement with this submission. When all the partners were made accused, it was their obligation to plead and prove that they had made the necessary nomination for getting out of the clutches of law. The accused, i.e. the original partners, did not make any effort and did not produce any document in support to show that any nomination was made by them. Even the present accused who was facing prosecution did not make any effort to show that the partnership firm had nominated anyone else to be responsible for the conduct of business of the Hotel. When, therefore, neither the original 3 partners nor the accused raised any such plea of there being any nomination as required under Section 17, then the Food Inspector was justified in prosecuting all the accused and mainly the present accused from whom the biryani was purchased by the Food Inspector on that day. If the purchase was made by the Food Inspector from the present accused and the

money was paid to him, then in the absence of any plea under Section 17, the accused/present Applicant was rightly prosecuted. Therefore, no advantage of Section 17 can be claimed by the present accused.

8. So far as the judgment in **State of Karnataka v. Pratap Chand and others (supra)** is concerned, it has no application to the facts of the present case. In that case, three partners of the firm M/s Mafatlal and Co. were charged under Section 18-A of the Drugs and Cosmetics Act, 1940. They were convicted. Their appeal was dismissed by the High Court summarily and when they went to the Supreme Court, their defence was that they had pleaded and disclosed to the Drugs Inspector the names, addressees and other particulars of the persons from whom the drugs were acquired. The Supreme Court allowed the appeal partly and set aside the conviction of accused No.2 by observing:

" What then does the expression "a person in charge and responsible for the conduct of the affairs of a company mean"? It will be noticed that the word 'company' includes a firm or other association and the same test must apply to a director in charge and a partner of a firm in charge of a business. It seems to us that in the context a

person 'in charge' must mean that the person should be in over all control of the day to day business of the company or firm. This inference follows from the wording of Section 23C (2). It mentions director, who may be a party to the policy being followed by a company and yet not be in charge of the business of the company. Further it mentions manager, who usually is in charge of the business but not in over-all-charge. Similarly the other officers may be in charge of only some part of business".

It will be clear from the judgment of the Supreme Court that Respondent No.2 was acquitted in facts which were peculiar to that case before the Supreme Court. These are not applicable to the present case as they are totally different. As already considered by me, the firm which was running the Hotel, had not nominated any person as required by Section 17 of the Act and it was the present accused from whom the sample was purchased and he is rightly roped in the present case.

9. Regarding the other submission made by Mr. Lotlikar, namely, not dividing the sample in 3 equal portions and sending the same to the Public Analyst, no benefit can be given to the accused because no prejudice is caused by sending 500 grams and not dividing the sample in 3 equal

parts. Nothing was argued in this behalf, neither anything was pointed out.

10. Delay of 8 days in testing the sample by the Public Analyst cannot also be of any help to the accused because the Public Analyst has clearly stated that as soon as the sample was received by her she kept it in fridge.

11. Thirdly, it was pointed out by Mr.Lotlikar that in the evidence of Food Inspector it is stated that the samples were kept in simple plain polythene bags and no preservative was used. As against this, it was pointed out the admission made by the Public Analyst to the effect "The preservative was used in the sample analysed by me." Mr.Lotlikar tried to contend that there was contradiction in the evidence of the Food Inspector and the Public Analyst as both were giving different versions. I am not in agreement with this submission. What the Public Analyst has admitted is only one sentence "the preservative was used in the sample analysed by me". This does not mean, for want of any further clarification, that when the sample was received it contained preservative. If that explanation was brought on record, then it could not have been considered as

a contradiction with the evidence of the Food Inspector.

12. Therefore, none of the points raised by Mr. Lotlikar help the accused. Lastly, he tried to contend that the offence of the accused comes under the last proviso to Section 16 and therefore, the sentence could be reduced to 3 months. This submission also cannot be accepted because Section 16(1)(a) is very clear. It speaks of manufacture or sale of articles of food and if it is adulterated minimum sentence is 6 months. No discretion is given to the Court for reduction of the sentence.

JANUARY 23, 2003.

13. Mr. Lotlikar, alternatively and lastly, contended that though Section 16 of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as 'the Act of 1954') prescribes a minimum sentence of six months, the words in the Act in the said Section are "be punishable with imprisonment" which, according to him, mean that discretion is given to the Court to impose punishment which is lesser than six months.

According to him, if the Legislature had used the words "shall be punished" or "be punished", then there could have been no discretion to the Court. In support of his contention, he relied on the judgment of this Court in **Balchandra Anant Mayokar & others v. State, reported in 1991(1) Goa L.T. 329** and contended that this judgment has clearly held that if the words "punished" are used, then there is no discretion to the Court, but if the words "punishable" are used, then discretion is given to the Court to award lesser than the minimum sentence prescribed.

14. In that case the petitioners were tried under Section 3 of the Goa, Daman and Diu Public Gambling Act, 1976 and they were convicted and sentenced to simple imprisonment for one month and fine of Rs.200, in default, simple imprisonment for eight days. The Sessions Court dismissed their appeal. Hence the matter came to the High Court. The Counsel of the accused/petitioners contended that Section 3 of the Goa, Daman and Diu Public Gambling Act, 1976 (hereinafter referred to as 'the Act of 1976') was worded so far as the punishment is concerned "shall be punishable with imprisonment for a term which may extend to two years and also with fine

which may extend to two thousand five hundred rupees". Therefore, according to the Advocate for the petitioners appearing in that case, the words "shall be punishable" gave a discretion to the Court about awarding sentence. Reliance was placed by the Advocate for the petitioners in that case upon judgment of this High Court in **Emperor v. Peter D'Souza**, reported in A.I.R. 1949 Bombay 41, **State v. Hamgonda Jayagonda Patil & others**, reported in A.I.R. 1964 Bombay 5 where distinction was made between the words "be punished" and "be punishable". Relying upon this judgment, the Court held that even though under the Act of 1976, Section 3 had provided "shall be punishable with imprisonment", awarding of substantive sentence of imprisonment was discretionary and, therefore, even though the Court upheld the conviction, the sentence of imprisonment of one month was set aside and the petitioners were directed to pay fine of Rs.1,000/- each.

15. Relying upon this judgment, therefore, Mr. Lotlikar contended that since Section 16 of the Act of 1954 had used the words "be punishable with imprisonment" discretion was given to the Court to award sentence less than six

months. He further pointed out that under Rule 29 of the Rules under the Prevention of Food Adulteration Act, 1954, synthetic food colours, namely, Tartrazine, could be used as prescribed by Rule 29, in a number of food articles like ice-cream, milk lollies, frozen dessert, flavoured milk, youghurt, ice-cream mix powder, biscuits, biscuit wafers, pastries, cakes, confectionery and number of other items as per sub-rules (a), (b), (c), (d), (e), (f) and (g) of Rule 29 and, therefore, there was no logic and reasoning in banning tartrazine in food articles like biryani. He also pointed out that the accused was having a Three-Years Diploma in Hotel Management and even as per the syllabus given to the accused by the said Institute and whatever was taught to him, orange colour can be used in biryani, tandoori chicken, sakharbhat, barfi and many other items like coconut barfi, bundi laddoo, coconut sweet, khaja and other recipes. He further stated that since in this case the accused has closed his business, he was the sole bread earner of his family and therefore considering the anomaly in the Act, the judgment of this Court referred to above (1991 (1) Goa L.T. 329) and other circumstances, this was a fit case for awarding

sentence less than the minimum and he suggested that fine could be imposed by this Court.

16. The learned Addl. Public Prosecutor tried to contend that this judgment is not applicable to the facts of the present case. However, her contention is without any force.

17. Considering the aforesaid judgment of this Court reported in 1991(1) Goa L.T. 329, it is clear that there is a discretion to this Court in awarding sentence when the word "punishable" is used and in the circumstances of the case as pointed out above, including permissive use of tartrazine in other food preparations as per Rule 29, the Revision is partly allowed. The conviction of the accused under Section 16 is maintained. He is sentenced to suffer imprisonment till the rising of the Court and to pay a fine of Rs.7,000/-. Fine to be paid within four weeks. This judgment is delivered in the facts and circumstances of the present case and shall not be cited as a precedent in other cases.

The accused was present in the Court when

the Judgment was pronounced and he remained present in the Court till the rising of the Court.

D.G. DESHPANDE, J.

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